85-457

No. ____

Supreme Court, U.S.
FILED
SEP 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1985

J. D. Westbrook, *Petitioner*

Vs.

State of Arkansas, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

FULKERSON & TODD, P.A.
Attorneys at Law
333 West Court Street
Paragould, Arkansas 72450
(501) 239-4002
BY: ANDREW FULKERSON

Counsel for Petitioner

QUESTION PRESENTED

Whether a Motion for a New Trial was improperly denied following the appellant's discovery that one of the jurors impaneled and sworn to try this action mislead the appellant as to her relationship with the Sheriff of Greene County, Arkansas who investigated and caused the arrest of the appellant and, along with several of his deputies, were named and/or used as witnesses at the trial herein?

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No. ____

In the
Supreme Court of the United States

October Term, 1985

J. D. Westbrook, *Petitioner*

Vs.

State of Arkansas, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

J.D. Westbrook, the petitioner herein, prays that certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above-entitled case on June 10, 1985.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is *J.D. Westbrook v. State of Arkansas*, reported at 286 Ark. 192, 691 S.W.2d 123 (1985) and is printed in Appendix A hereto, infra, page A-1. The judgment of the Circuit Court of Greene County, Arkansas is printed in Appendix B hereto, infra, page B-1.

JURISDICTION

The judgment of the Supreme Court of Arkansas (Appendix A, infra, page A-1), was entered on June 10, 1985. A timely petition for re-hearing was denied on July 15, 1985 (Appendix C, infra, page C-1). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the second section of Article 3 of the Constitution of the United States, which provides as follows:

> The trial of all crimes except in cases of impeachment, shall be by jury . . .

This case also involves the Sixth Amendment to the Constitution of the United States which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . .

Also involved is the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

J.D. Westbrook was charged in Greene County, Arkansas with Possession of Marijuana With Intent to Deliver. J.D. Westbrook, at that time a sixty-two year old Greene County farmer, was arrested on November 2, 1983 at his home.

Mr. Westbrook shared occupancy and use of this home with Mr. Jim Vick. Vick was the informant whose testimony culminated in the issuance of a search warrant for Mr. Westbrook's residence. Upon searching the residence, the officers found marijuana, marijuana seeds, and certain smoking paraphernalia in a china cabinet in the kitchen area of the residence. The total amount of marijuana seized from the residence was 9.1 ounces. There was testimony that a glass, which one officer believed had been used to smoke marijuana, was found in the living room area of the residence. There was no testimony that there was any odor of marijuana on Mr. Westbrook's person. The State produced testimony that certain drug-related literature was found in the defendant's bedroom. No drugs were found on the defendant's person or in the defendant's bedroom.

A certain amount of currency was found in the bathroom of the residence. The defense presented testimony that the cash came from sales of timber. There was no testimony that the cash came from sales of any drugs.

The defendant was alone in the residence at the time of the search and arrest. However, the officers' testimony confirmed that Mr. Westbrook shares the occupancy and use of the residence with Jim Vick.

There was testimony that Mr. Westbrook inquired of one of the officers as to where they obtained their information. There were no other statements made by the

defendant. The defendant did not testify at the trial. The jury found Mr. Westbrook guilty of possession of a controlled substance with intent to deliver and assessed his punishment at four years in the Arkansas Department of Corrections and payment of a $10,000.00 fine.

The appellant thereupon filed a timely motion for a new trial, which motion set forth the federal question raised herein. A copy of said Motion for A New Trial is printed in Appendix D hereto, infra, page D-1. One of the reasons for the filing of appellant's motion for a new trial was that one of the jurors impaneled and sworn to try this action mislead the appellant as to her relationship with the Greene County Sheriff, Andy Foster. During the selection of jurors the trial Judge asked if any of the jurors knew or had any acquaintanceship with the defendant, the attorneys or any of the witnesses. The list of witnesses read to the jurors included Greene County Sheriff Andy Foster and several of his deputies. The juror responded that she knew Sheriff Foster but only because he was the Sheriff. The juror was further questioned regarding Sheriff Foster by the attorney for appellant. She reaffirmed that she knew the Sheriff only in his professional capacity. She stated that the Sheriff's office served papers for her employer.

In reality, this juror was actively involved in the Sheriff's campaign for re-election. She had purchased an ad which appeared in the Paragould Daily Press on the day following appellant's trial, which ad supported Sheriff Foster's campaign for re-election. It was also evidenced that the juror in question was accepting contributions for the Sheriff's campaign.

The juror in question was subpoenaed to appear and give testimony at the hearing on appellant's motion for a new trial. The trial Court refused to allow said juror to be questioned for any purpose, including a proffer. The trial Court explained that he would not allow jurors to be subjected to anything that might make them uncomfortable.

Appellant's motion for a new trial was denied, and the Supreme Court of Arkansas affirmed.

REASONS FOR GRANTING WRIT

I. Certiorari should be granted to resolve conflicts in principal between the ruling of the Supreme Court of the State of Arkansas and the Constitution of the United States.

It has long been recognized by this Court that the constitutional guarantees of trial by a jury are necessary for the protection of persons who are accused of crime. *Ex parte Milligan*, 4 Wall. 2. This right to trial by a jury is fundamental to the American system of justice. *Duncan v. Louisiana*, 391 U.S. 145, Reh. Den. 392 U.S. 947 (1968). The Arkansas Supreme Court has decided this case in a manner which is in conflict with the foregoing and other decisions of the Supreme Court of the United States.

The relationship of the juror herein and the Greene County Sheriff may or may not have sufficient to sustain a challenge of the juror for cause. However, this information should have been provided by the juror so that the appellant and his attorney could make a reasoned premptory challenge. It has been recognized by this Court that information gleaned from voir dire is used by parties in their exercise of peremptory challenges of jurors. *Swain v. Alabama*, 380 U.S. 202 (1965). It has also been recognized that peremptory challenges are granted in aid of a party's interest to secure a fair and impartial jury. *Frazier v. U.S.*, 335 U.S. 497 (1948). The lack of candor on the part of the juror in question effectively denied the appellant of his right to a fair and impartial trial jury as mandated by the constitution of the United States.

This most sacred of all rights, that of trial by a fair and impartial jury, has been denied to the appellant. This honorable Court should grant certiorari for the purpose of

considering appellant's claim that his constitutional rights to an impartial jury has been violated. *Bumper v. State*, 391 U.S. 543 (1968).

II. Certiorari should be granted to resolve conflicts of principal among the lower Courts.

Article III, Section 2, of the Constitution of the United States provides that the trial of all crimes except in cases of impeachment, shall be by a jury. The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury. The due process clause of the Fourteenth Amendment to the Constitution of the United States imposes upon the States the requirements of Article III, Section 2 and of the Sixth Amendment to the Constitution of the United States that jury trials be available to criminal defendants.

Constitutional guarantees of the right to trial by an impartial jury acts as a limitation upon the authority of the State and the Court to condemn a man to punishment for an alleged crime without the determination of guilt by a duly constituted jury. *Flannagan v. Jepson*, 177 Iowa 393, 158 N.W. 641 (1916). So great is the right to trial by a jury, that if a defendant is denied this right, he is not required to show that he was injured by reason of the deprivation, and even with no showing of deprivation, the defendant is entitled to have his conviction set aside. *People v. Hartman*, 103 Cal. 242, 37 P. 153 (1894).

In a case similar to the matter at bar, the State of Florida has ruled that even if a juror's false answer on voir dire that he had never been represented by either of the attorneys representing the State in the case to be tried was given without any intent to deceive the defendant's attorney who was making the inquiry, the juror's false answer was such error as necessitated the granting of a new

trial. The Court held that the rule requiring truthful answers from jurors existed not only for the purpose of preventing actual evil, but also to prevent the appearance of evil and that the defendant was entitled to have the evidence weighed and considered by a jury, each member of which stood fair and impartial and not subject to any outside influence. *White v. State*, 129 Fla. 885, 176 So. 842 (1937).

Similarly, the Kansas courts have ruled in *Kerby v. Hiesterman*, 162 Kan. 490, 178 P.2d 194 (1947), that when a prospective juror, on voir dire examination, gives a false or deceptive answer to a question pertaining to his qualification, with the result that counsel is deprived of further opportunity to determine whether the juror is impartial, and the juror is accepted, a party deceived thereby is entitled to a new trial even if the juror's possible prejudice is not shown to have caused a just verdict. While the political relationship of the juror in question and the Sheriff, in and of itself may not have disqualified her from sitting as a juror in this matter, this information should have been disclosed to appellant for the purpose of exercising a peremptory challenge even if the challenge for cause was not directed.

The decision of the trial Court and the Arkansas Supreme Court, in addition to being in conflict with Federal and other State Court decisions as set forth hereinabove, is in conflict with other decisions of the Arkansas appellate courts. In the case of *Bryan v. Brady*, 244 Ark. 807, 427 S.W.2d 179, 181 (1968), four jurors did not fairly answer questions imposed by the trial Court as to whether they knew or were doing business with the other party. In ruling that the defendant was entitled to have a plaintiff's verdict set aside the Court stated that "truthful answers to the question would not necessarily disqualify the jurors, but how can we assert they returned a fair verdict when they did not give fair answers to the questions of the Court".

The Arkansas Court of Appeals affirmed the decision of the trial Court to grant a new trial in the case of *Zimmerman v. Ashcraft*, 268 Ark. 835, 597 S.W.2d 99 (Ark. App. 1980). In that matter, during the jury selection process, the Court asked prospective jurors if any of them were involved in pending litigations. The two jurors in question failed to respond. It was subsequently learned that these two jurors were parties to pending cases. The trial Court subsequently granted a motion for a new trial when this was discovered. In affirming the trial Court's decision to grant a new trial the Court of Appeals held that "the appearance of juror misconduct will be enough to warrant relief".

Lack of juror candor was also an issue in the matter of *D.F. Jones Construction Co., Inc. v. Fooks*, 199 Ark. 861, 136 S.W.2d 487 (1940). In that case jurors had been approached prior to trial and were offered a bribe in return for a verdict for the appellee. The fact that this was not disclosed to the Court "is a silent circumstance that they were not impartial." In ruling that the trial court should have granted the motion for a new trial, the Arkansas Supreme Court stated that jurors "owe it to themselves and to the great system to preserve the integrity of their verdicts."

The right of litigants and the Court to honest and complete answers from prospective jurors has been jealously guarded by Arkansas Appellate Courts in the civil actions cited hereinabove. When the question arises in the context of a criminal action the guard should be even more vigilant. This premise was stated in the case of *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898, 904 (1980) as follows:

> . . . the polestar that "justice ought not only to be fair, but appear to be fair" . . . the polestar should be more brighter and clearly visible in a criminal case than in a civil one rather than less so . . .

The appellant's right to a fair and impartial jury trial has been denied.

CONCLUSION

For the reasons stated hereinabove, petitioner respectively prays that a writ of certiorari be granted.

Respectfully submitted,

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BY: ANDREW FULKERSON

Counsel for Petitioner

APPENDIX A

SUPREME COURT OF ARKANSAS
No. CR 85-59

Opinion Delivered June 10, 1985.

J.D. WESTBROOK,

Appellant,	Appeal from Greene Circuit Court (CR-83-69);
V.	Gerald Brown, Judge.
STATE OF ARKANSAS,	
Appellee.	Affirmed.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. The appellant Westbrook was found guilty of possession of marihuana with intent to deliver and was sentenced to a term of four years and a $10,000 fine. For reversal he questions the sufficiency of the evidence and the court's rulings upon two other matters. The case was transferred to us by the Court of Appeals as presenting an issue of statutory construction. Rule 29(1)(c).

First, the sufficiency of the evidence. In considering this point we view the evidence in the light most favorable to the jury's verdict and do not weigh it against other conflicting proof favorable to the accused. When the testimony is so considered, this verdict is supported by substantial evidence.

Westbrook owned his home and shared its occupancy with Jim Vick. The two men each had a bedroom, with the other areas being jointly occupied. Vick signed the affidavit for a search warrant that led to a search of the house by

police officers. They found a total of 9.1 ounces of marihuana in the kitchen area, and none elsewhere. The marihuana was in various containers in a china cabinet. Possession of more than an ounce of marihuana creates a presumption of intent to deliver. Ark. Stat. Ann. § 82-2617 (d) (Supp. 1983).

The appellant relies upon *Ravelette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978), and like cases, for the rule that where there is joint occupancy of the premises there must be some factor in addition to the joint control to link the accused with the controlled substance. In *Ravelette* there was no such evidence. There the codefendant admitted that the marihuana was his and exonerated the appellant of any knowledge of its presence or control. Here Vick, the joint occupant, was not available to testify at the trial.

In this case there were several facts connecting Westbrook with the marihuana. He owned the house and had the superior right to its control. When the officers entered to make the search he was alone. In the area where he was sitting there was a class that contained burned marihuana residue. The glass was so warm to the touch as to indicate that the marihuana had been smoked or burned in it. In the kitchen there were several items of drug paraphernalia. In Westbrook's bedroom were a magazine featuring marihuana paraphernalia and another magazine entitled "Marijuana Growers Guide." In the bathroom was a kit containing two partially burned marihuana cigarettes. While an officer was searching the bathroom Westbrook came in, picked up a jewelry box, and started out. When the officer retrieved the box it was found to contain $3,700 wrapped in three brown paper bags. Upon being taken into custody Westbrook asked: "I would just like to know which whore in town turned me in." All this evidence is amply sufficient to satisfy the *Ravelette* requirement.

Second, it is argued that a juror, Sherry Long, gave misleading answers to questions put to her on voir dire. Those proceedings were not recorded. After the trial the

interrogation of Juror Long was reconstructed by counsel in connection with a motion for new trial. Only two questions and answers were included in the reconstruction. The first was during the voir dire of the jury panel as a whole:

> Judge Brown: Do any of you know, have any acquaintanceship or relationship by blood or marriage to any of the following witnsses, whose names are . . . Andy Foster . . . ?
>
> Sherry Long: I know Andy Foster, but only because he is the County Sheriff.

During the questioning of individual jurors defense counsel asked one question of Ms. Long:

> Mr. Fulkerson: Mrs. Long, I believe that you said you knew Andy Foster but only because he is the County Sheriff; is that right?
>
> Sherry Long: Yes, I work for Lee Gatlin at the Paragould Collection Bureau and we deliver papers to the Sheriff's office. That's how I know Sheriff Foster.

At the hearing on the motion for new trial the defendant's sister-in-law testified that she saw a political ad for the sheriff's re-election, signed by Sherry Long. The witness telephoned Ms. Long at home, learned that she had run the ad, and "I asked her if she was accepting political contributions, and she said: 'Well, yes.' " The defense had subpoena'd Ms. Long for the hearing, but the trial judge refused to allow her to be questioned. There was no proffer of what she might have testified, only a request to question her at the hearing.

No reversible error is shown. To begin with, the juror's answers are not shown to have been untrue or evasive. She was asked about her "acquaintanceship" with Foster and replied that she knew him only as sheriff. There is no proof

to the contrary. Ms. Long, although having delivered papers to his office for service, may have never even met the man and may have urged his re-election on the basis of the efficiency of his office. The defendant had the burden of proof at the hearing, but the proof is just not there. Moreover, although the sheriff had been listed as a witness, he did not testify at the trial. It is argued that some of his deputies did testify, but the assumption that Ms. Long may have been readily inclined to believe their testimony is hollow. The credibility of the State's witnesses was not even challenged, the defense being not that the State's testimony was false but that Westbrook had no connection with the marihuana found in his home.

On this point counsel also argue that "there is absolutely no foundation" for the court's ruling that Sherry Long could not be questioned and that "there are no decisions" saying jurors cannot be questioned about whether they withheld information on voir dire. Perhaps so, but on precisely the same premise there was no reason why defense counsel could not have questioned Ms. Long before the hearing and proffered whatever favorable testimony was elicited. That was not done, nor is it indicated that Ms. Long had refused to be interviewed, so that the court's assistance had to be invoked. The rule that one who seeks a new trial must make a showing of diligence is too familiar to need supporting authority. We cannot reverse the trial court's decision and grant a new trial without any showing that an interrogation of the juror would have disclosed testimony impeaching her candor on voir dire.

Third, it is argued that the governing statute fails to classify the offense in question as either a felony or a misdemeanor; so it must be treated as a misdemeanor. That objection, however, was not raised below, and we have held that this point cannot be raised for the first time on appeal. *Toland v. State*, ____ Ark. ____, ____ S.W.2d ____ (Apr. 22, 1985). It is also stated by counsel that in any event Westbrook should be allowed to petition the trial court for

postconviction relief under Rule 37. That rule requires that the petitioner be in custody and that the petition be verified by the petitioner. Neither requirement is shown, nor would we in any case grant such a request for permission to proceed before our own decision has become final.

Affirmed.

Purtle, J., dissents.

SUPREME COURT OF ARKANSAS
No. CR 85-59

Opinion Delivered June 10, 1985.

J.D. WESTBROOK,

APPELLANT,

V.

STATE OF ARKANSAS,

APPELLEE.

Appeal from Greene Circuit Court (CR-83-69); Gerald Brown, Judge.

DISSENT.

JOHN I. PURTLE, Associate Justice

My first disagreement is with the third point in the majority opinion where the majority refuses to construe Ark. Stat. Ann. § 82-2617 (a) (1) (iv) (Supp. 1983) as to whether possession of marijuana is a felony or a misdemeanor. We have refused to construe this statute several times because the issue was not considered preserved for appeal. When construction of a statute is holding up a large number of cases like this one is, we should construe it at the first opportunity.

My real disagreement is with the court's holding that the evidence was sufficient to sustain a conviction for

possession with intent to deliver. The snake in the grass in this case is Jim Vick. It was he who informed the sheriff, who himself was in the midst of a campaign for re-election, that marijuana was in appellant's house. I have no doubt about his reliability on this point because the evidence unmistakably reveals that he was the culprit who placed it there. Several witnesses observed Vick smoking marijuana and even saw him take dishes out of the trunk of his car that appeared to be the same dishes in which the marijuana was found. Vick shared appellant's house except that each maintained his own bedroom. No contraband was found in appellant's bedroom. Several ounces of marijuana were found in the kitchen area which was shared by the two men. The only evidence found in appellant's bedroom was an article or two about growing marijuana. He may have been curious about how such plants are grown but the evidence lends no credence to a charge of possession. A lustful thought in a man's mind will not support a charge of rape. Neither will reading about marijuana support a possession charge.

Two "roaches" were found in the bathroom but Vick may well have planted them there. This evidence might be incriminating of each occupant of the house and of each recent visitor to either Vick or appellant. The officers claim to have found a warm glass in the area where appellant was seated when they arrived with the search warrant supported by the now disappeared ungrateful Mr. Vick. I have no idea of how a warm glass points to possession of marijuana for sale. If it in any manner indicates the presence of marijuana, it was obviously for smoking it.

The appellant is a 62 year old farmer with no prior record. There was not even a rumor that he was trafficking in contraband. No one testified he was a dealer or even a user. The crime lab found the marijuana, exhibit 19, to contain 1.2 ounces of marijuana.

With a known user in the house, and the complete absence of direct evidence that appellant ever used, sold, manufactured or dealt in marijuana, I cannot find substantial evidence to support a verdict that appellant was guilty of possession with intent to deliver beyond a reasonable doubt.

I would reverse and dismiss.

APPENDIX B

IN THE CIRCUIT COURT
OF GREENE COUNTY, ARKANSAS
SECOND JUDICIAL CIRCUIT
CRIMINAL DIVISION

STATE OF ARKANSAS — PLAINTIFF

VS. — No. CR-83-69

J. D. WESTBROOK — DEFENDANT

JUDGMENT

NOW ON THIS 22nd day of May, 1984, this cause coming on to be heard, the Plaintiff appearing by Scott Hunter, Prosecuting Attorney within and for the Second Judicial Circuit of Arkansas and the Defendant appearing in person and by his attorney, Andrew Fulkerson, and the Defendant having waived formal arraignment and entered his plea of NOT GUILTY to the charge of POSSESSION OF MARIJUANA WITH INTENT TO DELIVER. All parties announced ready for trial on the 22nd day of May, 1984, and a jury of twelve from the regular panel of petit jurors were impaneled and sworn to try the cause, and having heard the evidence, the instructions of the Court, and argument of counsel, retired to consider its verdict, and the trial having lasted two (2) days, did on the 23rd day of May, 1984 return into the Court a verdict of GUILTY. Said verdict described as follows:

> We, the Jury, find the Defendant, J.D. Westbrook, guilty of possession of marijuana with intent to deliver, and fix his punishment at four (4) years in the Arkansas Department of Correction and payment of a $10,000.00 fine.
>
> Richard Newberry
> Foreman

The Defendant comes on now this 23rd day of May, 1984, ready for sentence. Whereupon, the Court did inform the Defendant of the nature of the charge, his plea thereon, and the verdict of the jury thereon, and asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED AND ADJUDGED, that the Defendant, J.D. WESTBROOK, is guilty as charged for the crime of POSSESSION OF MARIJUANA WITH INTENT TO DELIVER and that he be and is hereby sentenced to a term of four (4) years in the Arkansas Department of Correction, and payment of a $10,000.00 fine.

/s/ Gerald Brown
Circuit Judge

APPENDIX C

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
ARKANSAS COURT OF APPEALS
LITTLE ROCK

July 15, 1985

Dona L. Williams
Clerk

Robin Henthorne
Chief Deputy

Leslie W. Steen
Chief Deputy

Janie Owen
Deputy

Melissa Fuller
Deputy

Denise Parks
Deputy

Kit Acklin
Deputy

Andrew Fulkerson
Attorney at Law
333 West Court Street
Paragould, AR 72450

Re: CR85-59 J.D. Westbrook
v. State of Arkansas

Dear Mr. Fulkerson:

The Court made the following order in the above styled case today:

> "Petition for Rehearing is denied.
> Purtle, J., would grant. Dudley, J.,
> not participating."

Sincerely yours,

/s/ Dona L. Williams
DONA L. WILLIAMS, Clerk

DLW:rh

cc: Clint Miller
Mick Gramling

APPENDIX D

IN THE CIRCUIT COURT
OF GREENE COUNTY, ARKANSAS
SECOND JUDICIAL CIRCUIT
CRIMINAL DIVISION

STATE OF ARKANSAS — PLAINTIFF

VS. — NO. CR-83-18

J.D. WESTBROOK — DEFENDANT

MOTION FOR NEW TRIAL

Comes now the defendant, J.D. Westbrook, by and through his attorney, Andrew Fulkerson, and for his Motion, states and alleges:

1. That on May 23, 1984, the defendant was convicted of the charges of possession of a controlled substance with intent to deliver and was sentenced to a term of four years in the Arkansas Department of Corrections and a fine of $10,000.00.

2. That the verdict of guilty returned by the jury to the charge herein is contrary to the law and the evidence introduced at the trial herein. Further, the trial court erred in refusing to grant the defendant's motion for a directed verdict.

3. That one of the jurors empanelled and sworn herein, Sherry Long, misled the defendant as to her relationship with the Greene County Sheriff, Andy Foster. On voir dire, said juror indicated to the trial judge and to counsel for the defendant that she knew Andy Foster, but only due to the fact that he was Sheriff and that she had no other connection or relationship to Andy Foster.

4. That contrary to the above assertions of the juror, Sherry Long, said juror was actively involved in the campaign for re-election of Sheriff Andy Foster.

5. That the defendant, J.D. Westbrook, believes this motion to be meritorious and that this motion is not offered for the purpose of delay.

WHEREFORE, defendant, J.D. Westbrook, prays that the Court conduct a hearing on this motion; that he be granted a new trial; and for all other proper relief.

FULKERSON & TODD
Attorneys at Law
333 West Court Street
Paragould, AR 72450
BY: /s/ Andrew Fulkerson
Attorney for Defendant

MEMORANDUM BRIEF

Arkansas Statutes Annotated Section 43-2704 provides that prior to the time required for filing a Notice of Apeal, a person convicted of a felony may file a motion for a new trial. That the time within which a notice of appeal must be filed in this matter has not yet expired.

That there was no substantial evidence presented at defendant's trial which supported the finding of guilt. Further, this Court erred in refusing to grant the defendant's motion for a directed verdict of acquittal.

The Sixth amendment of the United States Constitution provides that in all criminal prosecutions the accused shall enjoy the right to trial by an impartial jury. That the failure of the above named juror to divulge her political association with Sheriff Andy Foster, who was listed as a witness herein, and whose deputies and agents testified herein, resulting in a denial to the defendant of his constitutional right to a trial by a fair and impartial jury.

Defendant recognizes that an objection to the prejudice of the juror is too late after the jury has rendered its verdict where the defendant failed to examine the juror on voir dire and was not misled or deceived by the juror. *Brown v. St. Louis, Iron Mountain & Southern Railway Company*, 52 Ark. 120, 12 S.W. 203 (1889). However, it has been recognized that the defendant does not waive the juror's disqualification if the point is raised on voir dire examination and the party is misled by the juror's statements or by his silence. *Rhoden v. Stephens*, 239 Ark. 998, 395 S.W.2d 754 (1965).

The defendant respectfully submits that he should be granted a new trial herein.

FULKERSON & TODD, P.A.
Attorneys at Law
333 West Court Street
Paragould, Arkansas 72450
BY: *Attorney for Defendant*

CERTIFICATE OF SERVICE

I, Andrew Fulkerson, do hereby certify that I have served a copy of the foregoing Motion and Memorandum Brief on the plaintiff by mailing a copy by regular U.S. Mail to Mr. James E. Goldie, Deputy Prosecuting Attorney, 414 West Court Street, Paragould, AR 72450, on this 22 day of June, 1984.

/s/ Andrew Fulkerson
Andrew Fulkerson

Supreme Court, U.S.
FILED
NOV 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

(2)

No. 85-457

J. D. WESTBROOK ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

OPPOSITION

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Counsel of Record

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APP

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-457

J. D. WESTBROOK ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND WHICH SUPPORTS PETITIONER'S CONVICTION.

This Honorable Court should deny petitioner's petition for writ of certiorari because there is an adequate and independent state ground which supports petitioner's conviction. It is well established that this Court will not review a state court decision that rests on separate, adequate and independent state grounds. *See Michigan* v. *Long*, 463 U.S. 1032 (1983).

In the instant case, the Arkansas Supreme Court decided, as matter of state law, that petitioner had failed to make a necessary proffer during his hearing on his motion for a new trial.

Because the petitioner failed to make the necessary proffer, the Arkansas Supreme Court held that it could not reverse the trial court's decision and grant a new trial to petitioner. *See* page 4 of the Appendix to the petitioner's petition. Petitioner's failure to make the necessary proffer of the expected testimony of juror Long is an adequate basis for the Arkansas Supreme Court's affirmance of his conviction and is entirely separate from the alleged prejudicial error in seating juror Long in the first place.

CONCLUSION

THEREFORE, respondent respectfully requests that this Honorable Court deny petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

Respectfully submitted,

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JUSTICE BUILDING
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